

Date: October 26, 1998

Case No.: 98-ERA-33

File no.: 01-0280-98-026

In the Matter of:

**Thomas Mastrianna**  
Complainant

v.

**Northeast Utilities Corporation**  
Respondent

For the Complainant:  
Robert W. Heagney, Esq.

For the Respondent:  
Timothy P. Matthews, Esq.  
Charles C. Thebaud, Esq.  
Paul J. Zaffuts, Esq.

Before:  
**DAVID W. DI NARDI**  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER  
DISMISSING CLAIM WITH PREJUDICE**

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. § 5851 ("the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. part 24. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (NRC) and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subject to discriminatory action for engaging in a protected activity. Complainant Thomas Mastrianna (Complainant) has alleged Respondent Northeast Utilities Corporation (Respondent) retaliated against him over a course of ten years, including when

he was terminated from employment in January of 1997.

By document filed August 6, 1998, Respondent has submitted a Motion for Summary Decision. In support thereof, Respondent argues summary decision is warranted because Complainant has: (1) failed to comply with the time requirements for filing a complaint; (2) failed to file a timely request for a hearing; and (3) failed to establish facts sufficient to allege a prima facie case. Complainant has filed a Brief in Opposition arguing that the claim is timely and valid and should go forward to a full hearing on the merits.<sup>1</sup>

I conclude that only those facts pertinent to the timeliness issue are germane to the pending motion and, therefore, this Judge shall not delve into the details of the underlying alleged retaliatory conduct at this time. Accordingly, I shall render this decision based on those facts which are established by the attested to materials submitted in conjunction with the Motion for Summary Decision and which are relevant to the question of timeliness.

#### **Summary of the Evidence**

The documents submitted in support of and in opposition to the Motion for Summary Decision support the following uncontroverted facts.

1. Complainant was an employee of Northeast Utilities' Connecticut Light and Power Company from August 9, 1976 through January 10, 1997, in a variety of positions and locations.
2. On or about December 16, 1988, Complainant raised a number of workplace issues to Ms. Virginia Fleming, of the Millstone Human Resources Department. Following the meeting, Ms. Fleming apparently informed her management that Complainant acted erratically and exhibited aberrant behavior during their meeting.

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<sup>1</sup> I pause to note that the Respondent has requested that this Judge reject the Complainant's Brief in Opposition because it was untimely filed. Respondent notes that Complainant's reply was due on September 11, 1998, yet was not filed until September 16, 1998. I conclude that Complainant's brief shall be admitted into the record and considered in ruling on Respondent's motion, based on the overriding interest in fairness and equity. Further, I note that Respondent was granted an opportunity to file a reply brief in this matter.

3. Following that meeting, Complainant alleges that his "access to the nuclear plant was unilaterally revoked and [he] was not allowed back into the nuclear facility." At that time, and for the next several years, Complainant was periodically observed by psychiatrists and diagnosed with Major Depressive Disorder. Further, Complainant's unrestricted access was suspended, reinstated, and suspended again. Further, he was subject to reassignment at non-nuclear sites first as a carpenter and later as a meter reader. Respondent has also alleged several performance complaints regarding Complainant's alleged excessive tardiness and absences from during this period.
5. On January 9, 1997, Complainant received a letter from Elizabeth H. Cusson, District Business Services Supervisor for the Connecticut Light and Power Company, indicating that his employment was terminated effective January 10, 1997 due to excessive absenteeism.
6. On January 13, 1997, a Union Representative of Local 457, International Brotherhood of Electrical Workers, filed a Third-Step Grievance on behalf of Complainant seeking reinstatement and restitution.
7. On July 3, 1997, Complainant, through his counsel James E. Mattern, Esq., filed a claim with the Connecticut Commission on Human Rights and Opportunities (CCHRO) requesting that the Commission investigate his claims of illegal discriminatory practices. Specifically, he stated that he was terminated on January 10, 1997 and believes that his Major Depressive Disorder was a factor in his termination in violation of the Americans with Disabilities Act, the Federal Rehabilitation Act and Connecticut General Laws.
8. On approximately April 8, 1998,<sup>2</sup> Claimant wrote a handwritten complaint to Occupational Safety and Health Administration (OSHA) alleging that Respondent had "intimidated, harassed, discriminated against and/or retaliated against" him and that his "contractual rights and human rights were violated on more than one occasion with recently an attempt at a 1997 discharge." This complaint was received by the Hartford, Connecticut OSHA office on April 14, 1998.

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<sup>2</sup> While the original, handwritten complaint was not dated, the typed version provided by Complainant's counsel listed April 8, 1998 as the date of the letter was composed.

9. On May 26, 1998, OSHA issued a determination letter dismissing Complainant claim because it was untimely and failed to allege a prima facie case of retaliation under the Act.
10. The United States Postal Services delivered a notice of the certified letter to Complainant's Post Office Box on both May 27, 1998 and June 5, 1998.
11. Complainant and his counsel allege that Complainant had limited access to his Post Office Box during this time, and he and his attorney learned of OSHA's dismissal on June 5, 1998 only when they received a copy of the letter from Northeast Utilities's Senior Counsel, Attorney Duncan MacKay.
12. On June 10, 1998, Complainant's counsel filed a notice of appeal with the Office of Administrative Law Judges. In this letter, Complainant's counsel stated: "Please note Mr. Mastrianna has not received official notice of the Department of Labor decision." (emphasis in original).
13. Complainant signed for the certified letter of determination on June 12, 1998.

#### STANDARD OF REVIEW

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d). This section, which is derived from Fed. R. Civ. P. 56, permits an Administrative Law Judge to recommend summary decision for either party where "there is no genuine issue as to any material fact." **29 C.F.R. § 18.40(d)**. The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. **Gillilian v. Tennessee Valley Authority**, 91-ERA-31 (Sec'y Aug. 28, 1995) (citing **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247 (1986); **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. **Id.** (citing **OFCCP v. CSX Transp., Inc.**, 88-OFC-24 (Asst. Sec'y Oct. 13, 1994)).

This Judge, acknowledging that summary decision is rarely granted, has applied this standard to the case at hand and concludes that Respondent's Motion must be **GRANTED**. I find and conclude that Complainant failed to file a timely complaint in this case and that none of the circumstances warrant equitable tolling of the filing requirements.

## DISCUSSION

Respondent's Motion for Summary Decision alleges three grounds for summary decision: First, Respondent argues that Complainant failed to timely file a complaint and that no grounds for equitable tolling apply. Second, Respondent argues that Complainant failed to file a timely appeal of OSHA's determination, and third, that Complainant failed to allege facts sufficient to establish a prima facie case of retaliation under the Act.

Complainant, on the other hand, argues that the facts and circumstance of this case justify the equitable tolling of the time in which Complainant had to file a complaint. Further, Complainant argues that he has both filed a timely appeal of OSHA's denial with the Office of Administrative Law Judges (OALJ) and has alleged facts sufficient to establish a prima facie case of discrimination.

### Request for a Hearing Before the OALJ

I will begin my discussion by focusing on the second issue raised by the parties, namely, whether or not the Complainant filed a timely appeal of the OSHA denial. I begin with this issue because it is really the threshold question of whether or not this Court has jurisdiction over this matter. I find and conclude that, based upon my review of the statutory authority, relevant case law, and undisputed facts of this case, Complaint has filed a timely appeal to this Office and that I have jurisdiction over this matter.

Under the ERA and its implementing regulations, a decision of the administrative agency will become final, unless a timely appeal is taken. The recently amended 29 C.F.R. § 24.4(d) provides that a notice of determination shall become the final order of the Secretary denying the complaint unless within **five business days** of its receipt the complainant files with the Chief Administrative Law Judge by facsimile, telegram, hand delivery, or next-day delivery service, a request for a hearing on the complaint. **29 C.F.R. § 24.4(d)(2)-(3)**. The Administrative Review Board, in discussing this provision, has noted that the time limitations are to be strictly construed. **Backen v. Entergy Operations, Inc.**, 95-ERA-46 (ARB June 7, 1996) (citing **Gunderson v. Nuclear Energy Services, Inc.**, 92-ERA-48 (Sec'y Jan. 19, 1993)). This is in accordance with the tight time-line established for so-called whistleblower cases, imposed by both statute and implementing regulations. For instance, the regulations provide strict timing requirements for the investigation of the complaint by the administrative agency. **See 29 C.F.R. § 24.4(d)(1)** (requiring that the investigation be completed within thirty days of filing of the complaint). Such a

tight schedule, imposed by Congress, provides for a timely and efficient handling of these complaints.

The facts indicate that while the original certified letter of determination was sent to the Complainant on May 26, 1998, it was not signed for by the Complainant until June 12, 1998. Complainant's counsel has expressly acknowledged that he and Complainant only received notice of OSHA's denial on June 5, 1998 when Attorney MacKay, Senior Counsel for Northeast Utilities, forwarded a copy to Complainant's counsel. A letter of appeal was faxed to the OALJ on June 10, 1998. Therefore, Complainant argues that because he filed a complaint within five business days of actual receipt, the appeal is valid. Respondent, however, argues that Complainant was negligent in not retrieving his mail in a timely fashion, and therefore requests that this Judge find that Complainant had constructive receipt of the determination letter five days after it was sent out, or June 1, 1998, pursuant to 29 C.F.R. § 18.4. Under that scenario, Respondent argues that Complainant's appeal letter was filed beyond the five day limitation, and therefore is untimely.

I find and conclude that Complainant has made a timely request for a hearing, and I reject the Respondent's arguments in light of a recent Administrative Review Board decision. In **Staskelunas v. Northeast Utilities Co.**, 98-ERA-7 (May 4, 1998), the ARB declined to adopt the Administrative Law Judge's use of 29 C.F.R. Part 18 to calculate constructive receipt of the OSHA determination letter by Complainant. **Id.** at n.5. The Board reasoned that the Office of Administrative Law Judge's (OALJ) rules of practice should not be applied to events taking place prior to the OALJ gaining jurisdiction over the matter. Rather, the Board relied upon the Complainant's actual receipt of the determination letter.<sup>3</sup>

I also reject Respondent's arguments that Complainant was somehow negligent or irresponsible in his receipt of mail. Respondent makes a lengthy argument, citing numerous actions Complainant could have or should have taken to ensure a more timely receipt of the letter of determination. I, however, conclude that those arguments fail to acknowledge that the record clearly indicates when Complainant received receipt of the actual letter of determination, and that, as previously noted, the ARB has clearly held that a Administrative Law Judge should not concern themselves

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<sup>3</sup> I also note that the constructive receipt rule articulated in **Corsier v. Westinghouse Hanford**, 92-CAA-3 (Sec'y Jan. 12, 1994), cited by Respondent, was limited to a situation where the actual date of receipt is unknown

with the issue of constructive receipt, where a date for actual receipt is present in the record.

Accordingly, I find and conclude, in light of **Staskelunas**, that Complaint had actual receipt of the letter of determination on June 5, 1998 when he received of a copy from Attorney MacKay. Thereafter, he timely filed a notice of appeal with the OALJ on June 10, 1998, within five business days, and therefore the request for a hearing is timely and this Court has jurisdiction over this matter. As such, I shall now address the two remaining arguments raised by the Respondent's Motion for Summary Decision.

### **Filing of Complaint with DOL**

An employee who believes that he or she has been discharged or otherwise discriminated against in violation of 42 U.S.C. §5851(a) must file a complaint with the Secretary of Labor within 180 days after such discriminatory act. **42 U.S.C. § 5851(b)(1)**. The time period for administrative filings begins running on the date that the employee is given definite notice of the challenged employment decision. **Bonanno v. Northeast Nuclear Energy Co.**, 92-ERA-40/41 (Sec'y Aug. 25, 1993). The time limits, however, are in the nature of a statute of limitations and are subject to equitable tolling. This Judge herein embarks upon the mission of striking an appropriate balance between "fidelity to statutory directive that complaints be pursued and investigated in a timely manner on the one hand and fairness to whistleblowing complainants on the other." **Hill and Ottney v. TVA**, 87-ERA-23/24, at 3 (Sec'y April 21, 1994), **aff'd**, 65 F.3d 1331 (6<sup>th</sup> Cir. 1995). I also note that summary decision is appropriate on the issue of equitable tolling where the Complainant fails to show a genuine issue of fact. **Hall v. EG&G Defense Materials, Inc.**, 97-SDW-9 (ARB Sept. 30, 1998).

For the purpose of this Motion for Summary Decision, this Judge finds and concludes that the 180 day period within which the complaint must have been filed began to run on January 9, 1997, the day Complainant received notice that he would be terminated. **See Bonanno**, 92-ERA-40/41. Therefore, the complaint should have been filed on or about July 20, 1997. Complaint filed this claim sometime in early April 1998, clearly outside of the 180 day window, and as such the claim is untimely and shall be dismissed, unless a grounds for equitable tolling exists.<sup>4</sup> Specifically,

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<sup>4</sup> Complainant expressly acknowledges that he failed to comply with the 180 day filing requirement, but argues that there are valid grounds for tolling. **See** Complainant's Brief in Opposition to Respondent's Motion for Summary Decision, at 9.

Complainant argues that he had timely filed the precise statutory claim in the wrong forum and that he relied upon the incorrect statements of a union representative.<sup>5</sup>

Generally, the doctrine of equitable tolling is narrowly applied and focuses on complainant's excusable ignorance of his statutory rights as a reason to modify the limitations period. **Harrison v. Stone & Webster Engineering Corp.**, 91-ERA-2, at 2 (Sec'y Oct. 6, 1992). The Secretary of Labor has uniformly held that equitable tolling of the statutorily imposed time period for filing an ERA complaint is possible only if: (1) the complainant was misled by the employer, (2) the complainant was prevented in some extraordinary way from asserting his rights, or (3) the complainant timely filed the precise statutory claim in the wrong forum. See, e.g., **Bonanno v. Northeast Nuclear Energy Co.**, 92-ERA-40/41 (Sec'y Aug. 25, 1993); **Hall v. EG&G Defense Materials, Inc.**, 97-SDW-9 (ARB Sept. 30, 1998); **Prybys v. Seminole Tribe of Florida**, 95-CAA-15, at 4 (ARB Nov. 27, 1996); see also **Smith v. American President Lines, Ltd.**, 751 F.2d 102, 109 (2d Cir. 1978). In considering the application of the doctrine of equitable tolling, this Administrative Law Judge is guided by the Administrative Review Board's decisions which recognize the restrictions on equitable tolling must be "scrupulously observed" and that the doctrine does not permit "disregard [of the] limitations periods simply because they bar what may be an otherwise meritorious cause." See **Prybys**, 95-CAA-15, at 8 (citing **School Dist. of City of Allentown v. Marshall**, 657 F.2d 16 (3d Cir. 1981)).

First, I note that while one of the grounds for equitably tolling the filing period is when the Employer actively misleads the Complainant, there is no companion rule for those situations where the Complainant relies on incorrect information from third parties. See **English v. Whitfield**, 858 F.2d 957, 963 (4<sup>th</sup> Cir. 1988); **Clark v. Resistoflex Co.**, 854 F.2d 762, 768-69 (5<sup>th</sup> Cir. 1988); **Doyle v. Alabama Power Co.**, 87-ERA-43 (Sec'y Sept. 29, 1989). As such, the Complainant's beliefs and actions motivated by assertions of a union representative do not serve as grounds for tolling the time restriction in this matter. Further, there is no evidence or allegation that Respondent actively misled Complainant in this matter.

The second grounds for tolling involves those situations where

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<sup>5</sup> I note that Complainant has offered no evidence or arguments relating to the first two grounds from tolling the filing period.

a complainant is prevented in some extraordinary way from filing a timely complaint. The Complainant argues that he suffers from Major Depressive Disorder and relied upon the misstatements of a union representative, as evidence of "extraordinary circumstances" that would warrant tolling.

As I have previously noted, any reliance on a statement made by a union representative are insufficient grounds for equitably tolling of this matter. Further, while equitable tolling may be proper where a complainant suffers from a mental disorder, such tolling is only permitted in extreme situations. Tolling based on a mental condition is only permitted where the mental condition in fact prevents a complainant from managing his or her affairs and understanding his or her legal rights. **See Hall v. EG&G Defense Materials, Inc.**, 97-SDW-9 (ARB Sept. 30, 1998) (citing **Miller v. Runyon**, 77 F.3d 189, 191 (7<sup>th</sup> Cir.), cert. denied, 117 S. Ct. 316 (1996)). In the present case, there is neither evidence, nor allegations, that Complainant was or is unable to manage his affairs or comprehend his legal rights. As such, I find and conclude that his mental condition is not severe enough to warrant the equitable tolling under these circumstances.

The third grounds for tolling involves those situations where a Complainant mistakenly files the "precise" whistleblower claim in the wrong forum. A court should not allow tolling, however, where a claim was intentionally filed under a separate scheme, seeking an alternative grounds for relief. **See Cox v. Radiology Consulting Assoc.**, 86-ERA-17 (ALJ Aug. 22, 1986); **see also cf. Peterson v. City of Wichita**, 706 F. Supp. 766 (D. Kan. 1989). This is clear, because a claim under an alternative scheme for relief does not raise the precise statutory claim of an ERA case. For example, in **Wood v. Lockheed Martin Energy Systems**, 97-ERA-58 (ARB May 14, 1998), the Complainant filed a complaint with the Department of Energy (DOE), well before filing a Department of Labor claim. The ALJ concluded that because there was no evidence that Complainant filed with the Department of Energy by mistake, equitable tolling was not applicable for the DOL claim. Rather, it appeared that Complainant had become dissatisfied with the Department of Energy process and therefore decided to file the DOL.<sup>6</sup>

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<sup>6</sup> The ARB quoted this portion of the ALJ's recommend decision; however, Complainant had petitioned for voluntary dismissal of the DOL complaint before the ARB so that he could pursue his DOE complaint. Thus, the ARB granted Complainant's motion for voluntary dismissal and did not rule expressly on the ALJ's holding on the timeliness issue.

Further, Respondent correctly notes that the Courts and the Secretary have indicated that equitable tolling is not appropriate where an employee was represented by counsel during the limitations period. **See e.g., Keyse v. California Texas Oil Corp.**, 590 F.2d 45 (2d Cir. 1978); **Smith v. American President Lines, Ltd.**, 571 F.2d 102, 109 (2d Cir. 1978); **McKinney v. Tennessee Valley Authority**, 92-ERA-22 (Sec'y Nov. 16, 1993).

In the present case, Complainant argues that he filed two timely claims which justify this tolling, namely the union grievance and the CCHRO complaint. On January 13, 1998, a Union Representative filed an internal grievance on behalf of Complainant for wrongful termination.<sup>7</sup> Complainant further stated that he "relied upon his understanding of the direction given to him by his union that he needed to exhaust his union grievance remedies before he pursued other actions." **See** Complainant's Brief in Opposition at 10.

On July 3, 1997, Complainant, by counsel, filed a complaint with the Connecticut Commission on Human Rights and Opportunities. This filing requested that the Commission investigate the claim that he was discriminated against because of his major depressive disorder. Complainant argues that he "raised the essence of a § 211 ERA claim in his CHRO complaint."

First, as previously noted, any actions or statements made by a union representative, and relied upon by Complainant will not be sufficient to toll the filing period.<sup>8</sup> Rather, only where the Employer misleads the complainant will tolling be permitted.

Second, the filing of a union grievance does not constitute the filing of the precise claim in the wrong forum. The Secretary of Labor, following Supreme Court precedent, has held that the pursuit of internal and union grievance procedures does not toll the filing period provided by employee protection provisions. **See Ackison v. Detroit Edison Co.**, 90-ERA-38 (Sec'y Aug. 2, 1990) (citing **International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.**, 429 U.S. 229 (1976)). In **Robbins & Myers**, the Supreme Court held that the filing limitations period

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<sup>7</sup> I note that Complainant has noted that this matter just concluded receiving evidence on September 8, 1998.

<sup>8</sup> I pause to note that while the Complainant cites his reliance on the statements of a union representative as a reason for not filing an complaint with the DOL, he was still able and willing to pursue the CCHORA complaint.

under Title VII of the Civil Rights Act of 1964 was not tolled by the Complainant's initiative of a grievance procedure under a collective bargaining agreement. The Court reasoned that the federal statutes and grievance procedure provided independent remedies which could be pursued concurrently. **Robbins & Myers, Inc.**, 429 U.S. at 233-38. This rule has been applied to cases arising under the Energy Reorganization Act where the Secretary has refused to toll the limitation period where a complainant requested tolling based on the timely filing of an internal grievance. **See Ackison**, 90-ERA-38. The relief sought in the union grievance is distinct from the statutory relief under the ERA. Further, the Complainant was not mistaken in filing the union grievance instead of the ERA claim. This is evidenced by the fact that the union grievance is still ongoing, having wrapped up investigation on or about September 8, 1998. If Complainant had mistakenly filed in the wrong forum, he would not elect to continue after discovering the correct forum. Rather, Complainant has continued to pursue both claims as they are separate and represent separate remedies. Therefore, I find and conclude that Complainant's filing of the union grievance, and reliance upon the advice of union representatives, is insufficient to toll the period for filing the ERA complaint in this matter.

I also find and conclude that the CCHORA Complaint is a wholly a separate procedure, inherently and fundamentally different from an ERA whistleblower claim. Therefore, I conclude that the CCHORA complaint is in no way the precise claim was filed in the wrong forum. Complaint filed the CCHRO claim alleging discrimination based on a psychological condition, not any whistleblowing activities.<sup>9</sup> As such, the CCHRO claim is not the precise statutory ERA claim, and it was not mistakenly filed with CCHRO rather than OSHA. **See Cox v. Radiology Consulting Assoc., Inc.**, 86-ERA-17 (Sec'y Nov. 6, 1986) (holding that where distinct relief was sought through alternative measures, equitable tolling is not applicable); **cf. Lewis v. McKenzie Tank Lines, Inc.**, 92-STA-20 (Sec'y Nov. 24, 1992) (holding that the filing of an EEOC claim did not toll the statute of limitations in an STAA case because the EEOC claim was based on age discrimination, and not retaliatory conduct, and therefore not a case of a mistake as to the proper forum). Finally, I note that Complainant was represented by counsel within

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<sup>9</sup> I reject Complainant's argument that the CCHRO complaint, involving depression, stems from Complainant's alleged whistleblowing and retaliatory conduct. Regardless of the sources of Complainant's depression, the CCHRO claim is based on discrimination based on his mental condition and not any retaliatory conduct.

the filing deadline, and that courts are extremely reluctant to allow for equitable tolling in situations where the "mistaken" complainant was represented by counsel. Thus, the fact that Complainant was represented during the filing of the CCHORA claim is further reason to deny equitable tolling under these circumstances.

Finally, as I have concluded that this matter should be dismissed on procedural grounds, I need not discuss Respondent's final argument that Complainant has failed to allege facts sufficient for a prima facie case of discrimination.

### **CONCLUSION**

Based upon the foregoing reasons, I find and conclude that Complainant failed to file this claim within the 180-day time period enforced by statutes. Further, I find that Complainant has offered no persuasive evidence to justify the tolling of this limitation period until April of 1998, almost fourteen (14) months following the last alleged discriminatory action by Respondent. Accordingly, Respondent's Motion for Summary Decision is hereby **GRANTED** and this matter is **DISMISSED WITH PREJUDICE**.

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**DAVID W. DI NARDI**

Administrative Law Judge

Boston, Massachusetts  
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**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).